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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 509

ANNA VALENTINE SEIBERT and Other German Beneficiaries, APPELLANTS

vs.

HERBERT BROWNELL, JR., Attorney General of the United States as Successor to the Alien Property Custodian, and ELISE KILIAN, Executor, APPELLEES

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

MOTION TO DISMISS

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellee Herbert Brownell, Jr., the Attorney General of the United States, respectfully moves that the appeal from the Judgment of the District Court of Appeal of the State of California be dismissed on the grounds that the judgment rests on an adequate non-federal basis and that the federal questions sought to be reviewed were not properly raised and preserved.

This is a direct appeal from the final judgment of the District Court of Appeal, Second Appellate District, Division Two), of the State of California, entered on April 12, 1956. This judgment became final on June 6, 1956, when the Supreme Court of California denied appellants' petition for hearing. A notice of appeal to this Court was filed on August 7, 1956. The jurisdictional statement was filed on October 15, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2).

STATEMENT

This is a will construction case which arose out of a petition filed by appellee Elise Kilian, as executrix of a decedent's estate, for instructions concerning distribution of the estate (C.T. 6-18).[1] The Attorney General of the United States appeared in these proceedings as a consequence of a vesting order issued under the authority of the Trading with the Enemy Act (40 Stat. 411, as amended, 50 U.S.C. App. §§ 1 et seq.),[2] by which he vested the interests of all German beneficiaries in the estate. Appellants are certain of the German beneficiaries whose interests were vested (R.T. 8-9).

The decedent, Louise Schneider, an American citizen and resident of California, died testate in 1945. Her last will, executed in 1943, disposed of her entire estate to her own relatives and to those of her predeceased husband (C.T. 36-47). Under the provisions

[1] "C.T." will refer to the Clerk's Transcript, "R.T." to the Reporter's Transcript, "App." to the Appendix of the Statement of Jurisdiction.

[2] The authority and functions of the Alien Property Custodian under the Trading with the Enemy Act were transferred to the Attorney General by Executive Order No. 9788, October 14, 1946, 11 Fed. Reg. 11981, 3 C.F.R. 1946 Supp. 169.

of the will, so far as here pertinent, she transferred $26,000 in trust, the income of which was payable to specified beneficiaries (Paragraph Eleventh (A) 1, C.T. 38), all residents of the United States. Upon the death of the last survivor of the income beneficiaries, the trust was to terminate and the corpus was to be paid to the two classes of beneficiaries named in Paragraph Eleventh (A) 2 (C.T. 38-39), a majority of whom were Germans residing in Germany (C.T. 14-15). The trust was to terminate earlier, however, and the corpus was to be paid to ten named beneficiaries, "anything to the contrary in Paragraph Eleventh of my will notwithstanding," upon the happening of the following event:

> If at anytime during the continuance of this trust alien residents of Germany shall become legally entitled under the laws of the United States and the State of California to take and inherit under my will and this trust . . . (Paragraph Eleventh (A) 3, C.T. 39).[3]

The appellants were among the ten named, and all ten were German aliens residing in Germany (C.T. 13, 34).

In 1946, the Alien Property Custodian vested the appellants' interest in this estate as well as that of the

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[3] Under Paragraph Twelfth, the decedent imposed spendthrift restraints on the interests in the trust and provided that the income and principal shall be "deliverable only to the beneficiaries designated hereunder at the times entitled to take the same under the terms of the trusts, and the personal receipt of said beneficiaries shall, at the option of the trustee, be conditions precedent to the payment or delivery of the same by the trustee to such beneficiaries." (C.T. 44)

other named German beneficiaries (C.T. 65-66, App. 23).[4]

In 1953, the executrix filed a Petition for Instructions Re Distribution (C.T. 6-18). At the hearing on the Petition, evidence was introduced to establish the existence of the reciprocity required by Section 259 of the California Probate Code, Cal. Stats. 1941, ch. 895, § 1 (R.T. 11-29).[5] The trial court found that such reciprocity existed (C.T. 32-33, App. 29). No issue has been raised as to that finding.

The trial court held that the decedent intended by the phrase, "alien residents of Germany shall become legally entitled . . . to take and inherit," to require as a condition of the gift of $26,000 made by Paragraph Eleventh (A) 3 that each German beneficiary named in that Paragraph be able personally to receive his specified share; that each such beneficiary was en-

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[4] Two of the ten named beneficiaries, Lischen Viereck and Richard Schneider, predeceased the decedent. Since Richard Schneider was not related to the decedent, his legacy lapsed and fell into the residue (C.T. 33, App. 29). Lischen Viereck, however, was decedent's sister. She left two children, Wilhelm Viereck and Louisa Heitman, both German aliens residing in Germany. Under the California anti-lapse statute (Probate Code, Sec. 92, Cal. Stats. 1931, ch. 281, p. 587), they succeeded to Lischen Viereck's interest (C.T. 33-34, App. 30).

The 1946 vesting order specifically covered the interest of Louisa Heitman, one of the two children of Lischen Viereck. Not specifically named in that order was Wilhelm Viereck, the other of Lischen's children. Accordingly, in 1954, the Attorney General, as successor to the Alien Property Custodian, amended the 1946 order to include the interest of Wilhelm Viereck (C.T. 67, App. 26). Wilhelm did not appear in this proceeding and is not one of appellants here (R.T. 8-9).

[5] That statute conditions the right of a non-resident alien to inherit in California upon the existence of a reciprocal right of an American citizen to inherit in the country of which the alien is a national. The statute is set forth at App. 2.

titled personally to receive his share of the $26,000; and that the Attorney General, as successor to the Alien Property Custodian, was not entitled to any part of the $26,000.[6] (C.T. 32-34, App. 28-32).

On appeal by the Attorney General, the District Court of Appeal reversed, holding (1) that at the time of the decedent's death in 1945 alien residents of Germany could take and inherit under the law and so the condition requiring that German aliens "shall become legally entitled . . . to take and inherit," was satisfied; hence, the trust terminated and the $26,000 became payable to the German beneficiaries at that time and passed to the Attorney General by virtue of the vesting order; and (2) that even if the interests created by Paragraph Eleventh (A) 3 were contingent and the contingency had not occurred at the time the Attorney General's order was issued, such interests were nevertheless property interests and were subject to the seizure authority conferred by the Trading with the Enemy Act (App. 33-49).

The District Court of Appeal denied appellants' petition for rehearing, and the Supreme Court of California denied their petition for a hearing in that court. This appeal followed.

ARGUMENT

Appellants set forth under "Questions Presented by Appeal" some thirteen separate so-called federal questions (Jurisdictional Statement, pp. 6-10), which, they "raised in the trial court, and again in the District Court of Appeal of the State of California * * * and again in the Supreme Court of the State of Califor-

[6] Except to the extent that the Attorney General participated in one share which lapsed and fell into the residue (C.T. 33).

nia." (*Id.*, p. 24.) Nowhere do they specify, as requir by Rule 15(d), how and when these federal questio were raised in the state courts. The fact is that th were not.

The only question raised by appellants in all Ca fornia courts was the non-federal one whether or n they had an interest in the estate at the time the A torney General issued his order (see, *e.g.*, Appellant Petition for Hearing in the Supreme Court of Ca fornia, which is included in the certified record on f with this Court). Their position was that the w gave them an interest subject to the condition that th could personally have and receive it. They contend that they had no property interest until that conditi was fulfilled, and that when the Attorney General issu his order, before the condition was fulfilled, they h nothing which could be seized. The District Court Appeal disagreed with their interpretation of the wi and held the nature of the condition to be such that was satisfied at the time of decedent's death and hen gave appellants a property interest at the time of t issuance of the vesting order. Thus, its decision to the only issue raised by appellants rested on adequate non-federal ground. Accordingly, this appe should be dismissed for want of jurisdiction.

To be sure, the District Court of Appeal *sua spon* upheld a 1954 amendment to the vesting order (Ap 26-27, 45-46), and to that extent dealt with a feder question. However, that federal question was not a serted either in the petition for rehearing in the D trict Court of Appeal or in the petition for hearing the Supreme Court of California. Moreover, appe lants have no standing to raise it because they are n

affected by the decision on that issue. The only German beneficiary affected is Wilhelm Viereck, and he has never appeared as a party (R.T. 8-9).

CONCLUSION

The motion to dismiss the appeal should be granted.

Respectfully submitted,

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NOVEMBER 1956.

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